No. 22364 and A

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BEVERAGE DISTRIBUTORS, INC.,
a corporation,

Appellant,

vs.

OLYMPIA BREWING COMPANY,
a corporation,

Appellee.

OLYMPIA BREWING COMPANY,
a corporation,

Appellant,

vs.

BEVERAGE DISTRIBUTORS, INC.,
a corporation,

Appellee.

Appeal from the United States District Court for the Northern District of California

ANSWERING AND OPENING BRIEF OF APPELLEE-APPELLANT OLYMPIA BREWING COMPANY

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ANSWERING AND OPENING BRIEF OF APPELLEE-APPELLANT OLYMPIA BREWING COMPANY

Pursuant to a stipulation of the parties, Olympia Brewing Company (Olympia) is filing a single consolidated brief as appellee answering the brief of Beverage Distributors, Inc. (BDI), plaintiff below and appellant in No. 22364 here, and as appellant on its cross-appeal, No. 22364-A. For the sake of simplicity, Olympia will set out its statement of jurisdiction and of the case at the beginning of the brief, but will answer all points raised in BDI's Opening Brief [Section V below] before arguing its own position as appellant [Section VIII below].

I

JURISDICTION

BDI has stated this court's jurisdiction was invoked under 28 U.S.C. § 1291 following denial of application for preliminary injunction in a suit brought pursuant to the antitrust laws of the United States [15 U.S.C. Sections 1, 2]. In fact, appellate jurisdiction rests upon the provisions for appeal from an interlocutory order granting or refusing an injunction [28 U.S.C. § 1292(a)(1)]. Olympia's cross-appeal, which likewise rests upon Section 1292(a)(1), was filed October 24, 1967, within the time allowed therefor by F.R.C.P., Rule 73(a).

II

STATEMENT OF THE CASE

While Olympia would not normally restate the case before this court in an answering brief, it is necessary that the numerous gross misstatements of fact and omissions be corrected. Olympia would not have this court think it accedes to the interpretation of the evidence which BDI makes. It does not. Specifically, Olympia submits the following:

1. The district court, *following a stipulation solicited by BDI* [2 R.T. 65], made no findings of fact or conclusions of law. The court made it perfectly clear that it preferred not to make findings on the state of the evidence before it [2 R.T. 48-49] and that it entered the order appealed from for the sole purpose of maintaining what it conceived to be the status quo [2 R.T. 40-41]. It is therefore incredible that BDI should urge upon this court any "findings" or "conclusions" of the court below — they simply do not exist. The reference to any recital contained in the temporary restraining order [BDI Br. 12]

must be understood in this light and in light of the additional fact that upon issuance of the temporary restraining order Olympia specifically disavowed plaintiff's contentions and reserved all its rights pending trial [R. 155]. BDI is therefore confronted at the outset of its appeal with absence of those factual premises on which its argument entirely rests.

2. Olympia does not maintain a system of exclusive territorial or customer restrictions such as are proscribed by *United States v. Arnold, Schwinn & Company,* 388 U.S. 365, 87 S.Ct. 1856, 18 L.ed.2d 1249 (1967). Olympia's distributors have complete freedom in selecting to whom and where they make sales [R. 196, 222-23; Hannah depos. pp. 105-6]. The fact that a distributor is responsible for servicing a particular geographical area imposes neither any *restriction* on him to avoid sales outside that area nor creates any *right* to expect absence of competition within the area. The record before the court contained a variety of instances in which Olympia distributors were making sales beyond their areas of responsibility [Hannah deposition, Exhibit 4, pp. 16-30, 216] without any reprisal or threat on Olympia's part [R. 44-45]. Since Olympia does not sell beer directly to retailers, it reserves exclusively to itself no group or class of potential customers. Hence there does not exist in this case the sort of "customer restriction" which the Supreme Court had before it in *White Motor Co. v. United States,* 372 U.S. 253, 83 S.Ct. 696, 9 L.ed.2d 738 (1963).

3. BDI as a distributor of Olympia Beer was subject to neither customer nor territorial restrictions on its sales of Olympia in California. To understand BDI's position as a beer wholesaler, it is necessary to discuss something of its history. BDI first distributed Olympia Beer in 1953 [R. 203]. At that time it was a wholly owned subsidiary of Safeway Stores, Inc. [Girard depos., Ex.

A., pp. 6-7] Until Olympia was able to sell beer to BDI, Olympia Beer was not carried by Safeway. By the same token, only those beers carried by BDI were stocked by Safeway [R. 202]. In 1958 Safeway sold the stock of BDI to its officers [Girard depos. p. 7]. The sale was accomplished in May 1958. In July 1958, A. D. Morton, at the time the principal shareholder and president of BDI [Girard depos. p. 8] wrote a self-serving letter to Olympia stating it chose to limit its sales to Safeway *as it had in the past* [R. 207]. Olympia acknowledged this letter [R. 70-73]. It did nothing else. Deposition testimony of Charles Jones, vice president of BDI, was submitted to the effect that BDI sold Olympia Beer everywhere in California it was licensed to do so [See App. A.][1]. Mr. Jones also testified that so far as he was aware no one at Olympia had ever discussed with anyone at BDI sales by BDI to any retailer other than Safeway [See App. A]. The record is absolutely devoid of *any* evidence that Olympia has taken *any* steps at *any* time to limit or restrict the nature or scope of BDI's sales efforts. Between 1958 and 1967 several other brewers discontinued sales in California of their beer to BDI [R. 68-69]. Safeway thereupon discontinued stocking each such beer [R. 202]. When Olympia notified BDI of its decision to terminate the distributor, it likewise expected to lose the Safeway business [Hannah depos. p. 133]. In fact, no distributor other than BDI sold

[1] Part of the record designated on appeal was the affidavit of David Brice Toy filed in opposition to the application for preliminary injunction [R.T. 2]. This affidavit, dated September 28, 1967, was omitted from the record transmitted to the court of appeals by the district court. It contained excerpts from deposition testimony of Mr. Jones given in 1966 in another suit, "Thriftimart, Inc. v. BDI, et al", L. A. Superior Court No. 863340. The parties have stipulated to supplement the record on appeal with this affidavit, but it is not part of the record as this brief is written. Rather than delay briefing of the case, Olympia is quoting the sections of Mr. Jones' testimony to which reference is made in Appendix A.

Olympia Beer to Safeway until September of 1967 [Hannah depos. p. 99 ff.]. BDI had a 15-year monopoly.

4. BDI is not a parallel competitor of any other Olympia distributor in the State of California. As BDI acknowledges [BDI Br. 3], it "operates differently" from other distributors. It does not provide many of the services of beer distributors which Olympia considers important to the proper merchandising of its product. A substantial portion of the affidavit of Phil H. Hannah, Olympia's Director of Sales, points out these differences [R. 199-202]. BDI does not provide these services because it does not go near its retail customers' stores. When BDI commenced soliciting orders for Olympia Beer from retailers other than Safeway, it did not seek to obtain orders from any small outlet which would require a small delivery or in-store servicing [Girard depos. pp. 40-42]. It sought orders only from customers capable of warehousing beer as was Safeway [R. 64]. Bearing in mind that Olympia Beer is fair traded at retail [R. 160] and (wholesale trading aside) cannot be sold on a quantity discount basis at wholesale[2] it is obvious BDI's object was to isolate for itself an important segment of the retail market [R. 205-6] by offering an apparently larger margin of profit between a fixed retail price and wholesale — a margin which it could not afford to give if it provided either service or sales on a full-scale basis [R. 205].

5. In undertaking a program of wholesale fair trade, Olympia neither consulted with nor followed the instructions of any other person. There was no conspiracy [R.T. 126]. On August 8, 1967, the officers of Olympia, after consulting with counsel, determined to institute a

2 Rule 105 of the California Alcoholic Beverage Control Department, 4 Cal. Admin. Code § 105, quoted at R. 178, requires all sales in a given county to be made at the same price by a particular wholesaler regardless of the quantity.

policy of wholesale fair trade in California [Hannah depos. p. 53; Schmidt depos. Ex. 5, p. 62]. Thereafter, Olympia filled every order which BDI submitted to it and did not cancel until BDI commenced the present action [R. 245-46]. BDI in its brief misstates the statement of counsel by casting it and the testimony of Olympia's officers as "admissions" that the fair trade program was intended to restrict BDI's sales. Counsel for BDI made this same misstatement to the trial court and the trial court rejected it [R.T. 96]. BDI was left free to sell any warehouse customer it wished or could, or indeed to commence route sales in the full service fashion [R. 76]. The fact is that until the time of hearing BDI was making a variety of sales to different retailer customers [Girard depos. pp. 32-39, 44], but at its own choice had made no attempt to begin sales to small retailers [Girard depos. pp. 41-42].

6. Olympia's decision to terminate was not reached from the same considerations which prompted its decision to fair trade. There is nothing in the record to sustain the repeated misstatement of BDI that Olympia's termination of BDI on September 7 was the result of any conspiracy or for the purpose of maintaing any system of territorial or customer restrictions. There is no statement by the court, and obviously no finding or conclusion to this effect. The court's comments are to the contrary [2 R.T. 31]. All officers of Olympia who testified by deposition or by affidavit stated repeatedly that the sole consideration motivating their decision to terminate BDI was the commencement of a substantial piece of litigation by BDI. The timetable is as follows [2 R.T. 21][3]:

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3 The transcript cited refers, at 1.20 to orders received "August" 5 and 6. Counsel mis-spoke himself: the dates were September 5 and 6 [Hannah depos. p. 125].

August 10 — Olympia commences fair trade policy;

August 18 — Olympia makes last shipment of pending BDI order;

August 30 — BDI commences the within suit;

September 1 — Suit is served by BDI in Olympia, Washington;

September 5 — BDI submits new order to Olympia;

September 7 — BDI is terminated as distributor.

Olympia's officers stated repeatedly that they corporately felt no capacity to do business in the intimate circumstances required between brewer and distributor with one who alleges those facts appearing in the complaint herein. [R. 204, 223; Hannah depos. p. 122; Schmidt depos. pp. 66-67; Morgan depos. Ex. 6, p. 13] For better or worse, Olympia's decision to terminate must stand on this basis. It cannot be placed on any other basis.

III

SUMMARY OF ARGUMENT

The trial court's view of the facts does not sustain BDI's argument. The court acted solely to maintain the status quo and not to enjoin any alleged territorial or customer restrictions. This is clear despite a lack of specific findings as called for by F.R.C.P. 52(a). Thus *United States v. Arnold, Schwinn & Co.,* 388 U.S. 365, 87 S.Ct. 1856, 18 L.ed.2d 1249 (1967) is not controlling. Olympia's institution of fair trade pricing at wholesale was entirely proper and lawful, not tainted by improper motive or design. In the circumstances there is no basis on which to reverse the trial court's denial of a preliminary injunction against that policy. Moreover, BDI has not shown entitlement to *injunctive* relief as such.

IV

OLYMPIA'S ARGUMENT AS APPELLEE

1. The Order Made by the District Court Is Consistent With the Court's Professed Desire Solely to Maintain the Status Quo Between the Parties Pending Trial.

At the threshold of any consideration of the legal issues framed by appellant's opening brief stands the fact that the trial court did not make findings of fact or conclusions of law at the end of the three-day hearing on BDI's application for a preliminary injunction [2 R.T. 65]. As indicated above, BDI's counsel solicited a waiver of findings in open court and this waiver was agreed to by counsel for Olympia [2 R.T. 65].

The rule of California *state* appellate procedure is clear that an absence of findings or conclusions obliges an appellate court to infer necessary findings in support of the order or ruling of the trial court. No extensive citation of authority is necessary to sustain this proposition.

See, e.g. *Johnson v. Rich,* 150 Cal.App.2d 740, 747 (1957).

This court has not ruled on the question whether F.R.C.P., Rule 52(a) gives a federal appellate court the same discretion or imposes a mandatory obligation on the trial court, not subject to waiver by the parties, to make findings as an aid to appellate review. See, e.g. *Berguido v. Eastern Air Lines, Inc.,* 369 F.2d 874, 877 (3rd Cir. 1966), aff'd on rehearing 378 F.2d 369 (1967) to this effect.

See also *Mayo v. Lakeland Highlands Canning Co., Inc.,* 309 U.S. 310, 316, 60 S.Ct. 517, 84 L.ed. 774 (1940; *Hopkins v. Wallin,* 179 F.2d 136 (3rd Cir. 1949) ; 5 Moore, *Federal Practice* 2668-70, § 52.07.

Given the state of the record, this Court has three choices:

It can adopt the California practice and assume the trial court would make adequate findings to protect its order (as the trial court indicated it would [2 R.T. 48-49]). As is said in *Johnson v. Rich, supra,* at 747:

> "There is an intention to admit the sufficiency of the findings and the evidence."

Alternatively, it can adopt one of the two options suggested in *Berguido:* either remand the matter to the trial court for special findings to supplement the record on appeal (as was done in *Mayo v. Lakeland Highlands Canning Co., Inc., supra*), or examine the record to determine if a "full understanding" of the trial court's ruling can be gleaned. 369 F.2d at 877.

Olympia does not suggest the drastic alternative of remand. In this instance, the basis for the court's ruling seems clear: A desire to maintain the status quo [2 R.T. 40-42].

By examining the comments of the court during argument of counsel, it is clear that the court did not make those "findings" upon which BDI now relies in in presenting its appeal. In dealing with the particular points raised by BDI, the court's comments indicate clearly that it was not satisfied BDI had proved the matters alleged by it in the following respects:

> (1) The court was not persuaded that BDI had proved a rigid territorial allocation of the Schwinn type by Olympia:
>
> "THE COURT: It seems to me you want to say there was no Schwinn type of rigid territorial allegation . . .

"I think there is a good deal in the record to support that.

"MR. TOY: Including, of course, the depositions and affidavits of officers of Olympia and the affidavits of their suppliers.

"THE COURT: That is right and to some extent even some of the things that you glean from some of the materials filed in behalf of plaintiff." [2 R.T. 20]

(2) Likewise BDI did not adequately show that Olympia was improperly motivated or acted in pursuance of an unlawful purpose:

"THE COURT: I am suggesting that the quantum of proof now before me to establish that this was the use of the Fair Trade Act, a shield against unlawful antitrust action — the quantum of proof there is not quite sufficient to convince me." [R.T. 126]

* * *

"THE COURT: I don't think you need go that far. I am not satisfied that there has been an adequate showing of the impropriety of the defendant's motives here . . .

"I don't think you [e.g. counsel for Olympia] need to pursue that, because I think if the motive is bad — contrary to your view — and the conduct is done in pursuance of unlawful purpose, helps effectuate unlawful purpose, and if the damage is irreparable, I have no difficulty in granting a preliminary injunction. But it doesn't seem to me that either or both of these requirements are implicit in the question of — I will put it another way.

"The burden of establishing both of those things has not in my opinion been met by the evidence before me at this juncture." [2 R.T. 9]

(3) As the previous quotation indicates, BDI did not satisfy the trial court that maintenance of Olympia's wholesale fair trade policy pending trial would cause BDI irreparable damage. [See also the colloquy at R.T. 119-20].

(4) Nor did BDI show the September 7 termination of BDI by Olympia violated the anti-trust laws of the United States:

"THE COURT: I am not asking you [e.g. counsel for BDI] to concede and there is no basis for your conceding that the stoppage in this instance was lawful. All I am saying is that you think it was unlawful. I am saying that maybe it was and maybe it wasn't.

"I am not too sure." [2 R.T. 26]

(5) The court did no more than preserve what it understood to be the status quo on the strength of what it took to be its equitable powers *extrinsic of* anti-trust considerations [2 R.T. 40-42].

The desire to maintain status quo *pendente lite* is, of course, a proper motivation for the granting of a preliminary injunction. In the appellant portion of this brief [Section VIII] Olympia will point out why the status here was not properly subject to injunctive preservation. For present purposes, Olympia notes only that the court acted pursuant to its general equitable, not its anti-trust powers.

Read in this light, the District Court's order has internal consistency: BDI is given the same source of supply which it had at the time it commenced suit against Olympia. Olympia is given the right to enforce its fair trade contract made in reliance upon California statutory authority.

BDI's entire argument is predicated on the false premise that the trial court's order is internally inconsistent. It reaches this position by asserting as facts found and conclusions made certain factual premises which are disputed by Olympia and which the Court did not adopt.

By incorrectly analyzing the court's view of the factual questions before it, BDI reaches the false conclusion that the trial court's order is inconsistent. This Court should make no such presumption. Neither the record before the trial court nor the court's comments during hearing sustain the false factual premise on which BDI's entire legal argument rests. Hence BDI's reliance upon *United States v. Arnold Schwinn & Co.*, 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed.2d 1249 (1967), is misplaced.

2. BDI's Appeal Is a Disguised Attack on California's Fair Trade Laws.

BDI miscasts this case in terms of an attack on an alleged system of customer and territorial restrictions. It is not. On the basis of the relief it seeks BDI challenges *only* a fair trade contract lawful under California state law. The Supreme Court has said:

> "Congress, however, in the McGuire Act has approved state statutes sanctioning resale price maintenance schemes such as those involved here. Whether it is good policy to permit such laws is a matter for Congress to decide. Where the statutory language and the legislative history clearly indicate the purpose of Congress that purpose must be upheld."
>
> *Hudson Distributors, Inc. v. Eli Lilly & Co.*, 377 U.S. 386, 394 84 S.Ct. 1273, 12 L.ed.2d 394 (1964)

BDI does not openly challenge Olympia's fair trade policy because it cannot. It did so in the trial court

without success [2 R.T. 38]. The trial court quite properly recognized that alcoholic beverages, including beer, are special commodities subject to stringent control. Passage of the Twenty-first Amendment placed this control in the hands of the several states.

See *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59, 57 S.Ct. 77, 81 L.ed. 38 (1936);

Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35, 86 S.Ct. 1254, 16 L.ed.2d 336 (1966).

The California Alcoholic Beverage Control Act [Calif. Bus. & Prof. Code § 23000, et seq.], among other provisions, gives permission for fair trade pricing of alcoholic beverages. [Bus. & Prof. Code §§ 24749, 24750]. By definition beer is an "alcoholic beverage" [Bus. & Prof. Code § 23004].

The California Supreme Court has twice upheld the constitutionality of the Act's fair trade provisions.

Wilke & Holzheiser, Inc. v. Dept. of Alcoholic Beverage Control (1966) 65 Cal.2d 349.

Allied Properties v. Dept. of Alcoholic Beverage Control (1959) 53 Cal.2d 141.

Other California courts faced with attacks on fair trade agreements have likewise uniformly upheld them.

A.B.C. Distributing Co. v. Distillers Distributing Co. (1957) 154 Cal.App.2d 175 [Calvert specified prices at which wholesaler sold to retailers];

DeMartini v. Department of Alcoholic Beverage Control (1963) 215 Cal.App.2d 787 [resale fair trade upheld];

House of Seagram, Inc. v. M.C.F., Inc. (1962) 200 Cal.App.2d 774 [resale fair trade upheld].

See also 36 Op. Att. Gen. 277, 280.

The *A.B.C. Distributing Co.* case is clear authority for Olympia's fair trade contracts. Plaintiff was a wholesaler who distributed defendant Calvert's alcoholic beverages. Calvert had a fair trade agreement establishing prices to be charged by the wholesaler to retail licensees. When plaintiff's distributorship was cancelled, he charged an unlawful restraint of trade under the Cartwright Anti-Trust Law, and specifically charged "that at all times defendants have determined, declared and controlled the prices from time to time to be charged by them of their immediate purchasers and by their purchasers upon resale thereby by means of contract provisions, implied agreements, arrangements, recording, and causing the recording thereof, and by other means." [154 Cal. App. 175, 179]. Upholding a nonsuit, the court noted that "From the mere fact of Calvert's refusal to sell plaintiffs, no inference of unlawful agreement can arise for the reason that a producer 'may lawfully select his own customers,' [Citations]" and further expressly stated with respect to the fair trade agreement:

> "Further to show that Calvert did not act violative of either the federal or state trade act, it fixed no prices upon its product except those which it sold to plaintiff and the prices at which the latter sold to retailers. In its 1953 contract with plaintiff, it specified the retail prices to be charged by plaintiff to retailers should be in accordance with the Fair Trade Act of California. Such control by Calvert over resale prices to be charged by plaintiff is in accordance with the law. (Cal. Alcoholic Beverage Control Act, Bus. & Prof. Code, sections 24750, 24756.)" [154 Cal.App.2d 175, 190].

It is to avoid the impact of the McGuire Act [15 U.S.C. § 45] and the Miller-Tydings Amendment to the Sherman Act [15 U.S.C. § 1] that BDI disguises its

object, but the relief it seeks is revealing: it does not apply for a court order forbidding customer or territorial restrictions on resale; it attempts only to evade a constitutional agreement controlling prices. It has no legal basis to do so.

3. The Schwinn Case Does Not Control the Issues on This Appeal.

BDI places critical, indeed fatal reliance on *United States v. Arnold Schwinn & Co.,* 388 U.S. 365, 87 S.Ct. 1856, 18 L.ed.2d 1249 (1967). A close examination of that case is therefore necessary.

In *Schwinn* the court had before it a defendant manufacturer who "had been 'firm and resolute' in insisting upon observance of territorial and customer limitations". 18 L.Ed.2d at 1256. The court held that such limitations in the context of consignment and agency arrangements were subject to the rule of reason (e.g. *White Motor Co. v. United States,* 372 U.S. 253, 83 S.Ct. 696, 9 L.ed.2d 738 (1963)) and, so viewed, were not unreasonable. 18 L.Ed.2d at 1261. The court *held further* that such limitations, where the manufacturer sold the product to its distributor violated Section 1 of the Sherman Act [15 U.S.C. Sec. 1] *per se.* 18 L.ed.2d at 1262. In so doing the court nevertheless recognized both the propriety of customer selection (e.g. *United States v. Colgate & Co.,* 250 U.S. 300, 39 S.Ct. 465, 63 L.ed.992 (1919) *and* the legality of price fixing *permitted by statute.* 18 L.ed.2d at 1258.

Thus *Schwinn* turns on two factors not present here: a *system* of enforced territorial and customer restrictions; and *acts in furtherance* of that system. Olympia, has already invited the court's attention to those comments of the trial judge negating any conclusion that Olympia maintained unlawful limitations or acted to

protect a system of customer or territorial restrictions. These lacunae in BDI's case make its reliance on *Schwinn* meritless: as already stated this is *not* a *Schwinn* case. Both fact and causation are missing.

This brief will not be extended by lengthy comment on the conspiracy cases which BDI cites. E.g. *United States v. General Motors Corp.,* 384 U.S. 127, 86 S.Ct. 1321, 16 L.ed.2d 415 (1966); *American Tobacco Co. v. United States,* 328 U.S. 781, 66 S.Ct. 1125, 90 L.ed. 1575 (1946). The trial court made no finding of conspiracy. If anything is clear from the record, it is that Olympia does not kowtow to its distributors in making business decisions [e.g. Hannah depos. pp. 154-58].

Nor need the "statutory exception" cases be dealt with. They too are beside the point. Whatever may be the rule when one uses a statutory exemption to violate the antitrust laws, that rule will not apply if one does not violate the law. Therefore Olympia will not extend this brief to comment individually on each authority cited by BDI. Instead reference will be made only to two cases involving fair trade.

United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 64 S.Ct. 805, 88 L.ed. 1024 (1944) involves a price fixing conspiracy which the defendant only partly cured by fair trading. The injunction against fair trade — issued only after trial on the merits and at the instance of the United States, not a private litigant — significantly lasted six months only. Defendant was clearly invited to renew its fair trade contracts once its price-fixing violations were cleared up. BDI's brief makes it clear it would not be satisfied with this sort of relief.

United States v. Frankfort Distilleries, 324 U.S. 293, 65 S.Ct. 661, 89 L.ed. 951 (1945) is an instance of criminal sanctions against a horizontal price-fixing con-

spiracy. The Supreme Court said only this was not covered by the Miller-Tydings Amendment or the McGuire Act [15 U.S.C. Sec. 1, 45].

BDI cites no case for the proposition that a fair trade contract can be struck down for the sole reason that it decreases competition. This is one obvious result of such contracts. BDI's sole complaint is that, because it offers less value for the customer's dollar, it cannot successfully compete. Nothing in *Schwinn* or any other authority cited guarantees an inadequate competition a place in the market.

Given the present posture of the case, the court must make certain assumptions; namely, that Olympia acted in the exercise of its independent business judgment without conspiring with any other party in undertaking a wholesale policy of fair trade pricing, and that in doing so it did not act to further any scheme of territorial or customer restrictions violative of Section 1 of the Sherman Act. Given these assumptions, this court is then confronted with the following single, narrow issue:

> *Does United States v. Arnold, Schwinn & Co. preclude reliance by a manufacturer upon a statutorily authorized pricing scheme whereby independent distributors purchase from the manufacturer at the same price, resell the product at the same price to retailers who, in turn, sell the product at the same price wherever and to whomever they choose.*

Olympia submits that it does not.

4. BDI has made no case for injunctive relief.

It is obvious that injunctive relief, particularly in the context of an antitrust suit and particularly at a preliminary stage in the proceedings is a serious and heavy remedy to grant a complaining party. To grant

an injunction the trial court should have been satisfied (1) that the case warranted extraordinary treatment, (2) that the decree sought by BDI would not alter the status quo, (3) that the decree would not have the effect of regulating an entire industry, and (4) that BDI would not suffer irreparable harm if the decree were denied. As already pointed out, the court below was satisfied on none of these points [2 R.T. 40-42].

As expressed in the leading case of *Warner Bros. Pictures v. Gittone,* 110 F.2d 292 (3rd Cir. 1940) at 293:

> "We have pointed out frequently that the granting of a preliminary injunction is an exercise of a very far-reaching power, never to be indulged in except in a case clearly demanding it. [Citations] To justify the granting of such an injunction there must be a showing of irreparable injury during the pendency of the action. [Citations] It must also appear that the injunction is required to preserve the status quo pendente lite." 110 F.2d 292, 293.

Furthermore:

> "At this stage of the proceedings the Court is governed by the familiar rule that preliminary injunction should be viewed with caution and only granted in those clear cases where there is a substantial probability of eventual success." *John J. & Warren H. Graham v. Triangle Publications, Inc.* (E.D. Pa. 1964) 233 F.Supp. 825, 829, aff'd *Graham v. Triangle Publications, Inc.* (3 CA 1965) 344 F.2d 775.
>
> See also *Alpha Dist. Co. of California v. Jack Daniel Distillery,* 304 F.2d 451 (9th Cir. 1962).

The trial court entertained considerable doubt as to the merits of BDI's complaint [2 R.T. 49]. This in itself

is grounds for denying the extraordinary relief sought. BDI did not carry its burden of proof.

Graham v. Triangle Publications, Inc., supra;

Paramount Pictures Corporation v. Holden, 166 F. Supp. 684 (S.D. Calif. 1958);

Automatic Radio Manufacturing Co. v. Ford Motor Co., 242 F.Supp. 852 (D. Mass. 1965);

Deltown Foods, Inc. v. Tropicana Products, Inc., 219 F.Supp. 887, 891 (S.D.N.Y. 1963);

See *Hershel California Fruit Products Co. v. Hunt Foods, Inc.,* 111 F.Supp. 732, 733 (N.D. Calif. 1953).

Moreover, the lower court was properly reluctant to resolve the ultimate factual issues on which this case turns [2 R.T. 49]. This too is a proper ground to deny the injunction sought.

Paramount Pictures Corporation v. Holden, 166 F.Supp. 684, 691 (S.D. Calif. 1958);

Alpha Dist. Co. of California v. Jack Daniel Distillery, 207 F.Supp. 136 (N.D. Calif. 1961) aff'd 304 F.2d 451 (9th Cir. 1962);

George W. Warner & Co. v. Black & Decker Manufacturing Company, 167 F.Supp. 860 (E.D. N.Y. 1958); summary judgment granted 172 F.Supp. 221 (E.D. N.Y. 1959), rev'd 277 F.2d 787 (2d Cir. 1960);

Lowe v. Consolidated Edison Co., 67 F.Supp. 287 (S.D. N.Y. 1941).

And, as was said in *Hershel California Fruit Products Co. v. Hunt Foods, Inc.,* 111 F.Supp. 732 (N.D. Cal. 1953), at 734:

> "The preservation of status quo should not be confused with the economic stabilization of a whole industry, as compared with the restoration or attempted restoration of competition within such industry."

Most importantly, BDI has shown no irreparable injury. For this reason alone the injunction could not issue.

Graham v. Triangle Publications, Inc., supra;

Gerber Products Co. v. Beech-Nut Life Savers, 160 F.Supp. 916 (S.D. N.Y. 1958).

Although BDI invites this court to treat this appeal as a trial de novo, clearly the lower court's view of BDI's damage and Olympia's design, motive or intent are not matters open to such review.

United States v. Yellow Cab Co., 338 U.S. 338, 70 S.Ct. 177, 94 L.ed. 150 (1949).

See: 5 Moore, *Federal Practice* 2616, ¶ 52.03[1] (and cases cited at n.26).

The cases relied upon by BDI simply do not rebut the foregoing standards of judicial conduct. None concern the case, as here, where all key factual issues have been decided against the applicant. So much of BDI's application as sought to enjoin enforcement of the fair trade contract was properly denied.

OLYMPIA'S OPENING BRIEF ON CROSS-APPEAL

V

STATEMENT OF ERRORS

1. The trial court in seeking to preserve the status quo erred by issuing an injunction to enforce a contract which did not exist and was not specifically enforceable.

VI

SUMMARY OF ARGUMENT

The trial court sought to maintain what it understood to be the status quo between the parties, namely, a course of dealing extending back over 15 years. By doing so, it in effect wrote a new contract between the parties and gave specific performance to an agreement which did not exist. This lay beyond its power.

VII

ARGUMENT

1. The Trial Court Recognized BDI Had No Right to Expect a Continuing Relationship With Olympia.

On the basis of the trial court's comment during the hearing, it is clear that the court issued a preliminary injunction, after first inviting a stipulation from the parties to the same effect, solely for the purpose of maintaining a situation in statu quo. Olympia recognizes that it is confronted with something of the same dilemma facing BDI, namely, the lack of specific findings in the record before this Court establishing the basis on which the court continued the temporary restraining order in effect. However, the court's comments during the course of the hearing indicate several things.

(1) The court did not consider that continuing the temporary restraining order, which envisages fair trade sales, would damage Olympia because it would place BDI on an equal footing with other Olympia distributors [2 R.T. 34].

(2) The court did not think that BDI showed a contract of distribution [2 R.Tr. 35]. Thus the court accepted Olympia's position — not seriously refuted by BDI — that the relation between the parties was on a

sale-by-sale basis subject to termination at will [R. 203-204].

(3) Olympia's decision to terminate its relationship with BDI was not the result of any conspiracy or in furtherance of any scheme to protect an illegal system of distribution. It was made "for the reason that plaintiff brought this suit [2 R.Tr. 31].

It will be apparent that the court in issuing its order was dealing with a matter of contract and not a matter of the antitrust laws. It has already been indicated that the court did not reach the conclusions critical to BDI's appeal, namely, that an illegal territorial system had been established or that any conduct of Olympia was directed toward protecting such system, if there were one. Hence the court's order should be viewed simply in terms of the attempted enforcement of a particular relationship between the parties.

2. The Trial Court Erred by Enforcing an Agreement Which Does Not Exist.

Although it does not concede it, Olympia is prepared to assume for the purposes of this appeal that it will not suffer irreparable damage by continuance of the preliminary injunction until trial. Nevertheless, an injunction should not have been issued to preserve the status quo because the arrangement between the parties is not one susceptible of specific enforcement. This very proposition was recognized in *Alpha Dist. Co. v. Jack Daniel Distillery,* 207 F.Supp. 136 (N.D. Cal. 1961) aff'd 304 F.2d 451 (9th Cir. 1962). To the same effect is *A.B.C. Dist. Co. v. Distillers Dist. Corp.,* 154 Cal.App.2d 175 (1957).

Olympia is entitled to a free choice of distributors under both California [Bus. & Prof. Code § 25007] and

federal law [*United States v. Colgate & Co.*, 250 U.S. 300, 39 S.Ct. 465, 63 L.ed. 992 (1919)]. Dissatisfaction with a litigious distributor is an entirely proper basis for termination. *House of Materials, Inc. v. Simplicity Pattern Co.*, 298 F.2d 867 (2d Cir. 1962).

Indeed BDI recognizes that its relation with Olympia was terminable at will without cause. In its Supplement to Complaint, the only condition of termination which BDI alleges is reasonable notice [R. 39]. This is the classic basis for an award of damages, if proved, not injunction.

This precise factor was recognized by *Warner v. Black & Decker Mfg. Co.*, 167 F.Supp. 860 (E.D. N.Y. 1958) where injunction pendente lite was *denied*. A lengthy discussion of the question is set out at 167 F.Supp. 863-64. It is submitted the conclusion of the learned trial judge in that case should have been applied by the court here: it is *not* enough that Olympia may suffer no harm before trial to warrant issuance of a preliminary injunction. There must be an arrangement between the parties which can be specifically enforced. Here there is none. If BDI prevails at trial it is entitled to money damages only. For this reason the trial court erred in issuing an order that Olympia continue to deal with BDI pending trial. The court in effect is enforcing an agreement which does not exist. This it cannot do.

CONCLUSION

Neither the state of the record nor any "findings" of the district court sustains the critical assumptions made by BDI in its appeal. The court did not accept as true that Olympia maintained any system of territorial or customer restrictions proscribed by the antitrust laws of the United States. Nor did it conclude that Olympia's action in instituting a fair trade policy or in terminating BDI as a distributor was the result of an attempt to maintain such a system. The court's action was one turning on the relationship between the parties as manufacturer and distributor extrinsic of antitrust considerations. Therefore the court properly denied the application to enjoin Olympia's fair trade policy. But it gave BDI a status it had not enjoyed before the hearing by requiring Olympia to continue sales to BDI pending trial. This much of the court's order should be vacated.

Respectfully submitted,

Lillick, McHose, Wheat,
Adams & Charles

By John C. McHose

Attorneys for Olympia Brewing Company

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

By _____
John C. McHose

APPENDIX A

Portions of the Affidavit of David Brice Toy dated September 28, 1967.

At pp. 1-2:

STATE OF CALIFORNIA
CITY AND COUNTY OF
SAN FRANCISCO } ss.

David Brice Toy, being first duly sworn, deposes and says of his own knowledge as follows:

1. He is an attorney associated with the firm of Lillick, McHose, Wheat, Adams & Charles who are attorneys for defendant Olympia Brewing Company herein.

2. On July 19, 1966, he attended at the continued deposition of Charles Hammond Jones, taken in the case of "Thriftimart, Inc. vs. Beverage Distributors, Inc., et al.," case number 863,340 in the Los Angeles Superior Court. Both Beverage Distributors, Inc. (BDI) and Olympia Brewing Company (Olympia) were and are defendants in that suit.

3. At that deposition Mr. Jones, who identified himself as vice president and manager of BDI's Southern California division, gave the following testimony under oath:

at p. 10:

Q "Have you or anyone from BDI, ever contacted Olympia with respect to a desire to effect sales to others than Safeway?

A I haven't, no. To my knowledge, I don't know whether anyone else has.

Q So far as you know, no one else has? Is that what you are saying?

A I am saying I just don't know. I haven't been present at the meetings between, say, Mr. Morton and Olympia representatives in San Francisco; so, I wouldn't know if the subject were discussed.

Q Did Mr. Morton ever tell you that he had discussed it with anyone from Olympia?

A He hasn't, no.

Q Have you ever seen any memorandum indicating that Mr. Morton, or anyone else from BDI, had discussed the possibility of sales to others with Olympia?

A No, I haven't."

at pp. 12-16:

Q Do you know Mr. Arthur Halgren?

A Yes.

Q Except for the conversation of July 3, 1958, to which you have already testified, have you or anyone at BDI ever discussed the question of distribution of Olympia beer to anyone other than Safeway in California with Mr. Halgren?

A I can't recall any specific conversation. This could have been discussed, but I don't recall any.

Q Do you recall Mr. Morton ever relating a conversation he might have had with Mr. Halgren to you?

A I don't recall any.

Q Do you know whether or not in your corporate records there are any memoranda of such a conversation between anyone at BDI and Mr. Halgren?

A I don't know of any, no.

Q Do you know Mr. Harry Moore?

A Yes.

Q Have you ever had a discussion on the same subject matter with Mr. Moore since 1958?

A I don't recall any discussions with Mr. Moore about it, no.

Q Do you know if anyone else from BDI has had such a discussion with Mr. Moore?

A None that I know of.

Q If such a discussion with Mr. Moore were to be had, who at BDI would be likely to have had it?

A It would have probably been me.

Q Do you know Mr. Thomas Morgan?

A No, I don't.

Q Do you recall any conversations with any other employees of Olympia, except Mr. Halgren, Mr. Moore, or Mr. Morgan, between yourself and such employees, respecting the questions of sales by BDI to Thriftimart of Olympia beer since 1958?

A No, I can't recall any.

Q Do you recall Mr. Morton's ever relating any conversation with other employees which he might have had to you?

A No, I can't.

Q Do you know whether there are any memoranda in the company files now relating to such conversation?

A I am not aware of any.

At page 209, 1.20 to page 211, 1.14:

Q BY MR. TOY: Who establishes BDI's price for retail resale of Olympia beer in California, Mr. Jones.

A As of now?

Q As of now?

A I do.

Q Did Mr. Morton establish it before his death?

A Yes.

Q Is there any agreement between BDI and Olympia respecting the price at which BDI sells its beer?

A No, there isn't.

Q Are you aware of any conversations or discussions between 1958 and the present date between representatives of BDI and representatives of Olympia regarding the price at which BDI sells Olympia beer?

A I don't know of any, no.

Q Has Olympia ever indicated to you in writing or otherwise its dissatisfaction with the pricing arrangements made by BDI for sale of Olympia beer?

A No.

Q Does BDI have any arrangements with Olympia respecting the territory in which it is to sell Olympia beer?

A We sell it in all of the areas in which we are licensed to operate, which is California, Arizona and Nevada.

Q That's throughout the State of California?

A Yes.

Q Except insofar as such an arrangement is set out in the 1958 exchange of correspondence to which you have already testified, does BDI have any other arrangement or agreement with Olympia respecting the customers to whom BDI may sell Olympia beer?

A That is the only arrangement or agreement concerning customers that I know of.

Q So far as you are aware, are there any unwritten or oral arrangements or agreements respecting customers?

A None beyond the ones we have mentioned, the written —

Q The two letters?

A Yes.

Q Now, in his questioning, Mr. Lydick went into Mr. Murrell's affidavit of July 20. Have you got a copy of that now in hand?

[Colloquy of counsel]

At page 212, 1.1 to page 213, 1.7:

Q BY MR. TOY: I am referring now to Page 9 of Mr. Murrell's affidavit. I think Mr. Lydick read this particular sub-paragraph to you earlier, Mr. Jones. It says, "On September 17, 1964, Declarant telephoned Charles Jones of BDI and asked why Thriftimart had not received delivery of the six different carloads ordered on July 23, 1964."

Earlier in the affidavit Mr. Murrell says that Thriftimart placed a registered mail order for various beers, including Olympia.

Mr. Jones replied that, "The orders had been sent to BDI's San Francisco office. Declarant then asked Mr.

Jones if the brewers had refused to allow BDI to fill the orders to Thriftimart. Mr. Jones replied I would rather not say"?

Q Had Olympia in fact, as of September 17, 1964, refused to allow BDI to fill the orders to Thriftimart?

A I don't know whether they were passed on to Olympia or not; copies of those orders.

Q Did Mr. Morton ever tell you that copies of the orders had been sent to Olympia?

A It was my understanding that Thriftimart mailed the orders, or a copy of the orders, to each of the brewers involved.

Q Did you ever have any discussions yourself with representatives of Olympia respecting these orders?

A No. I didn't.

Q Do you know if Mr. Morton ever had such a conversation?

A I don't know.

Q Did he ever report such a conversation to you?

A He didn't.